

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD DIAZ,

No C 07-2612 VRW (PR)

Petitioner,

ORDER DENYING PETITION FOR A  
WRIT OF HABEAS CORPUS

v

DERRAL ADAMS, Warden,

Respondent.

\_\_\_\_\_ /

Richard Diaz seeks a writ of habeas corpus under 28 USC section 2254, which for the reasons that follow, the court denies.

On November 18, 2002, petitioner was charged with three counts in an amended information filed in the superior court for Monterey County: (1) second degree robbery in violation of California Penal Code section 211; (2) grand theft in violation of California Penal Code section 487(c); and (3) unlawful use of a badge in violation of California Penal Code section 538(b)(2). In addition, the information alleged that petitioner had suffered three prior strike convictions under California Penal Code section 1170.12 and one prior serious felony conviction under California Penal Code

1 section 667(a).

2           There were two jury trials in this matter. The first took  
3 place in December 2002. Before the jury was empaneled, the  
4 prosecution dismissed the grand theft charge. The jury found  
5 petitioner guilty of unlawful use of a badge, but was unable to  
6 reach a verdict on the robbery charge. The trial court declared a  
7 mistrial as to that count.

8           On April 10, 2003, in a second trial, the jury convicted  
9 petitioner of second degree robbery. The court also found true the  
10 allegation that petitioner had three prior strike convictions of  
11 robbery and one prior serious felony conviction of robbery.

12           On June 25, 2003, the trial court exercised its discretion  
13 and struck two of the three prior strike convictions and sentenced  
14 petitioner to 15 years. The sentence for robbery included the upper  
15 term of five years, doubled for the one prior strike conviction  
16 pursuant to the Three Strikes Law, California Penal Code section  
17 667(b), and a five year enhancement for the one prior serious felony  
18 conviction. On the unlawful use of a badge conviction, the trial  
19 court imposed a concurrent county jail sentence of 365 days.

20           On August 21, 2005, the California Court of Appeal stayed  
21 the county jail sentence pursuant to California Penal Code section  
22 654 and affirmed the judgment in all other respects. On that same  
23 date, the court also summarily denied petitioner's request for state  
24 habeas relief based on a claim of ineffective assistance of counsel.

25           On June 29 and July 27, 2005, the Supreme Court of  
26 California denied review, and, on February 20, 2007, the Supreme  
27 Court of the United States denied certiorari.



1 When Peralta and the blonde woman got behind the  
2 school building, two men came towards them. One  
3 of the men was defendant. Defendant wore a  
4 badge on his chest area and carried a flashlight  
5 in his hand. He spoke to Peralta, saying, "I'm  
a policeman. I want your ID." Peralta took out  
his wallet and defendant grabbed it. The wallet  
had both American and Philippine cash in it.

6 Peralta tried to grab his wallet back, but he  
7 was unsuccessful because defendant hit him on  
the head with a hard object and he became dizzy.  
8 Defendant also told the blonde woman to use a  
stun gun on Peralta, which made him feel weak.  
9 At some point during the struggle, Peralta lost  
his dentures. After using the stun gun,  
10 defendant and the blonde woman ran away.  
Peralta chased them and saw defendant drop the  
11 wallet and a knife near the school gate.  
Peralta picked up the knife because he was  
12 afraid they would stab him with it. As he did  
so, he saw defendant pick up the wallet and  
13 throw it to the blonde woman.

14 After defendant and the blonde woman left the  
area, Peralta returned to his van and drove to a  
15 street corner where he told a passerby he had  
been robbed. That person called police on a  
16 cell phone. Officer Godwin responded and  
Peralta told him that someone had stolen his  
17 wallet. Peralta also gave the officer a knife.  
They went back to the school grounds where  
18 Officer Godwin recovered Peralta's ATM card,  
dentures and identification card. Both the ATM  
19 card and the identification card were in  
Peralta's wallet before the incident involving  
20 defendant. Peralta also received medical  
treatment from paramedics, including an ice pack  
21 for his head injury.

22 Peralta gave a description of the perpetrator to  
Officer Godwin that he relayed to other police  
23 officers. Officer Godwin then took Peralta to  
look at a man who might have been involved in  
24 the robbery. Peralta did not recognize the man.  
Next, Officer Godwin showed Peralta a man who  
25 was standing near the school grounds. Peralta  
identified the man as the one who had robbed  
26 him. At that time, defendant was wearing a  
security officer's badge around his neck.

27 Officer Sanchez spotted defendant as defendant  
28

1 was walking in the vicinity of the school.  
2 Officer Sanchez followed defendant into a motel,  
3 where he made contact and observed that  
4 defendant was wearing a security officer's  
5 badge. Officer Sanchez asked defendant to  
6 accompany him to a street corner to meet another  
7 officer. As they walked, Officer Sanchez  
8 noticed the badge was no longer visible. When  
9 Officer Godwin and Peralta met them at the  
10 street corner, defendant removed the badge from  
11 underneath his sweatshirt at Officer Sanchez's  
12 request.

13 After Peralta identified defendant as the  
14 perpetrator, a third officer, Officer Vance,  
15 told defendant he was under arrest. Defendant  
16 responded that the only wallet he had was his  
17 own. Until that time, no one had said anything  
18 about a missing wallet in defendant's presence.

#### 19 The Police Investigation

20 After defendant was placed under arrest, a  
21 friend of Peralta's arrived. The friend  
22 assisted in translating some of Peralta's  
23 statement to Officer Godwin. However, before  
24 the friend provided any assistance, Peralta gave  
25 Officer Godwin an account of the robbery that  
26 was different from the version Peralta later  
27 gave at trial. Peralta stated that he had  
28 stopped his van in response to a woman flagging  
him down and asking him about sex. Three women  
came to the driver's side window to talk to  
Peralta. As Peralta was talking to the women,  
defendant also came to the driver's side window  
and asked Peralta for identification. Peralta  
took his wallet out in order to get his  
identification. As he did so, defendant reached  
in the van and grabbed the wallet. Defendant  
also reached for a knife in his waistband, but  
Peralta took the knife first. Defendant then  
ran into the school grounds, where Peralta  
struggled with him to get the wallet back.

Officer Godwin also interviewed defendant.  
Defendant said that he worked as a security  
guard at a motel near the school where the  
robbery took place. He initially stated that he  
had witnessed the robbery, which had been  
committed by his brother, another man named  
Freddy Moreno, and a blonde girl. Defendant  
then stated that some months ago he, his  
brother, and Freddy Moreno had worked with a

girl to "jack jags." "Jack" means to rob someone, and "jag" is a derogatory term for a Hispanic person. The scheme involved offering the potential victim a soda or a date, meaning an act of prostitution. Defendant's role was to use a badge, rather than force, to take the victim's property.

During the interview, defendant gave Officer Godwin a second statement about the incident. He explained that he "blew it" and struck Peralta on the head with a large flashlight after seeing Peralta in the schoolyard with defendant's mentally retarded, 18-year-old daughter or stepdaughter. Peralta had his wallet in one hand and money in the other hand and was reaching for the young woman. Defendant's knife fell out of his pocket during the confrontation. Defendant acknowledged that he might have picked up Peralta's wallet and thrown it away from him, before running away.

Defendant then gave a third statement about the incident to Officer Godwin. Defendant said that he thought that Peralta was soliciting his daughter, Victoria S, for prostitution. He approached Peralta, showed him his badge, and asked for identification. At that point, defendant became upset and struck Peralta on the head with his flashlight.

After the interview, Officer Godwin went to defendant's apartment to look for Victoria S. The apartment was on the first floor and Officer Godwin was able to look through a window and see inside defendant's room. He saw a stun gun lying on top of the bed.

People v Diaz, No H026161, 2005 WL 941402, at \*\*2-4 (Cal Ct App Apr 21, 2005).

## II

A federal writ of habeas corpus may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1)

1 resulted in a decision that was contrary to, or involved an  
2 unreasonable application of, clearly established Federal law, as  
3 determined by the Supreme Court of the United States; or (2)  
4 resulted in a decision that was based on an unreasonable  
5 determination of the facts in light of the evidence presented in the  
6 State court proceeding." 28 USC § 2254(d).

7 "Under the 'contrary to' clause, a federal habeas court  
8 may grant the writ if the state court arrives at a conclusion  
9 opposite to that reached by [the Supreme] Court on a question of law  
10 or if the state court decides a case differently than [the] Court  
11 has on a set of materially indistinguishable facts." Williams v  
12 Taylor, 529 US 362, 412-13 (2000).

13 "Under the 'unreasonable application' clause, a federal  
14 habeas court may grant the writ if the state court identifies the  
15 correct governing legal principle from [the] Court's decisions but  
16 unreasonably applies that principle to the facts of the prisoner's  
17 case." Id at 413. The Supreme Court has made clear that "a federal  
18 habeas court may not issue the writ simply because that court  
19 concludes in its independent judgment that the relevant state-court  
20 decision applied clearly established federal law erroneously or  
21 incorrectly. Rather, that application must also be unreasonable."  
22 Id at 411. A federal habeas court making the "unreasonable  
23 application" inquiry should ask whether the state court's  
24 application of clearly established federal law was "objectively  
25 unreasonable." Williams, 529 US at 409.

26 The only definitive source of clearly established federal  
27 law under 28 USC section 2254(d) is in the holdings, as opposed to  
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1 the dicta, of the Supreme Court as of the time of the state court  
2 decision. Id at 412; Clark v Murphy, 331 F3d 1062, 1069 (9th Cir  
3 2003). While circuit law may be "persuasive authority" for purposes  
4 of determining whether a state court decision is an unreasonable  
5 application of Supreme Court precedent, only the Supreme Court's  
6 holdings are binding on the state courts and only those holdings  
7 need be "reasonably" applied. Id.

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9 III

10 Petitioner seeks habeas relief under 28 USC section 2254  
11 based on six claims: (1) he was denied due process because the  
12 trial court failed to provide a jury instruction on unanimity; (2)  
13 he was denied due process because the trial court instructed the  
14 jury on an inapplicable theory of liability; (3) he was denied due  
15 process because the trial court erroneously admitted character  
16 evidence; (4) he was denied due process because there was  
17 insufficient evidence to support his conviction for unlawful use of  
18 a badge; (5) he was denied his right to effective assistance of  
19 counsel due to counsel's failure to file a suppression motion; and  
20 (6) he was denied his Sixth and Fourteenth Amendment rights due to  
21 the trial court's imposition of the upper term sentence without the  
22 benefit of a jury trial or the proof beyond a reasonable doubt  
23 standard.

24  
25 A

26 Petitioner claims that the trial court violated his due  
27 process rights when it failed to give the jury CALJIC No 17.01, the  
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1 instruction on unanimity. Petitioner argues that the instruction  
2 was required because two conflicting stories were presented to the  
3 jury.

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6 The California Court of Appeal provided the following  
7 background for petitioner's claim:

8 Defendant asserts that the trial court's failure  
9 to sua sponte give the standard unanimity  
instruction, CALJIC No 17.01, constitutes  
10 reversible error. FN2 The record reflects that  
defendant did not ask the trial court to give  
11 CALJIC No 17.01. However, defendant may raise  
the issue on appeal because, absent a request by  
12 the defendant, the trial court has a duty to  
give the instruction "'where the circumstances  
13 of the case so dictate.'" People v Riel (2000)  
22 Cal4th 1153, 1199, quoting People v Carrera  
14 (1989) 49 Cal 3d 291, 311, fn 8.

15 FN2. CALJIC No 17.01 (6th ed 1996) provides:  
"The defendant is accused of having  
16 committed the crime of \_\_\_\_\_ [in Count  
\_\_\_\_\_] . The prosecution has introduced  
17 evidence for the purpose of showing that  
there is more than one [act][or] [omission]  
18 upon which a conviction [on Count \_\_\_\_\_]  
may be based. Defendant may be found guilty  
19 if the proof shows beyond a reasonable doubt  
that [he][she] committed any one or more of  
20 the [acts] [or] [omissions]. However, in  
order to return a verdict of guilty [to  
21 Count \_\_\_\_\_], all jurors must agree that  
[he][she] committed the same [act][or]  
22 [omission] [or] [acts] [or] [omissions]. It  
is not necessary that the particular  
23 [act][or] [omission] agreed upon be stated  
in your verdict."

24  
25 The unanimity instruction arises from the state  
constitutional requirement that a jury verdict  
26 in a criminal case be unanimous. People v Russo  
(2001) 25 Cal4th 1124, 1132; Cal Const, art I, §  
27 16. For the verdict to be unanimous, the jury  
must agree that the defendant is guilty of a  
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1 specific crime. "Therefore, cases have long  
2 held that when the evidence suggests more than  
3 one discrete crime, either the prosecution must  
4 elect among the crimes or the court must require  
5 the jury to agree on the same criminal act." Id  
6 at 1132.

7 Defendant contends that the trial evidence  
8 revealed two possible factual scenarios for the  
9 robbery and therefore CALJIC No 17.01 was  
10 required. In one version given to police,  
11 Peralta said that defendant grabbed the wallet  
12 from his hand while Peralta was seated in his  
13 van. Peralta then pursued defendant into the  
14 schoolyard where defendant used force to retain  
15 possession of the wallet. In the second  
16 version, defendant told Officer Godwin that he  
17 struck Peralta because Peralta was  
18 propositioning his daughter for sex, then took  
19 the wallet.

20 Thus, according to defendant, "[t]he jury heard  
21 evidence that the wallet was taken: (1) without  
22 force while Mr Peralta sat in his vehicle; or  
23 (2) after the use of force at the schoolyard.  
24 Since these acts occurred at different locations  
25 and under different factual scenarios, the court  
26 had a duty to give [CALJIC] No 17.01." Defendant  
27 also argued that he had asserted a different  
28 defense to each factual scenario.

The People see the evidence differently. While  
conceding that the evidence contains conflicting  
accounts of the robbery, the People urge that  
only one course of conduct was involved and any  
factual discrepancies are legally irrelevant.  
The People also point out that defendant  
asserted only one defense at trial: that  
Peralta's versions of the incident lacked  
credibility, and defendant's least culpable  
version (whereby defendant assaulted Peralta in  
the schoolyard but did not take his wallet)  
should be accepted. Accordingly, they contend  
that a unanimity instruction was not required.

People v Diaz, 2005 WL 941402, at \*\*4-5 (footnote in original).

The California Court of Appeal found no error in the trial  
court's failure to give the unanimity instruction. The court  
stated:

1 As the California Supreme Court has explained,  
2 "where the evidence shows only a single discrete  
3 crime but leaves room for disagreement as to  
4 exactly how that crime was committed or what the  
5 defendant's precise role was, the jury need not  
6 unanimously agree on the basis or, as the cases  
7 often put it, the 'theory' whereby the defendant  
8 is guilty." People v Russo, supra, 25 Cal4th at  
9 1132. Here, the prosecution's closing argument  
10 illustrates that the evidence in this case shows  
11 only a single discrete crime: "Whether the  
12 defendant hit the victim over the head and then  
13 took his wallet or whether he took his wallet  
14 and then hit him over the head doesn't matter  
15 because either way, the robbery is continuing."

16 Thus, the evidence showed there was only one  
17 possible robbery offense, defendant's seizure of  
18 Peralta's wallet by force, arising from one  
19 continuous course of conduct. The jurors were  
20 not required to unanimously decide exactly how  
21 the crime occurred, ie, whether the defendant  
22 used force before or after grabbing the wallet,  
23 or whether defendant grabbed the wallet while  
24 Peralta was in his car or in the schoolyard.  
25 Therefore, the circumstances of this case do not  
26 require a unanimity instruction.

27 People v Diaz, 2005 WL 941402, at \*\*5-6.

28 2

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the challenged instruction by itself so infected the entire trial that the resulting conviction violates due process. Estelle v McGuire, 502 US 72, 72 (1991). Whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury. See Duckett v Godinez, 67 F3d 734, 745 (9th Cir 1995). Furthermore, the omission of an instruction is less likely to be prejudicial than a misstatement of the law. See Walker v Endell, 850 F2d 470, 475-76 (9th Cir 1987). A habeas petitioner whose claim involves a failure

1 to give a particular instruction bears an "especially heavy burden."  
2 Villafuerte v Stewart, 111 F3d 616, 624 (9th Cir 1997) (internal  
3 quotations marks omitted).

4 Even if failure to give a particular jury instruction  
5 amounts to a violation of due process, habeas relief may be granted  
6 only if the error had a substantial and injurious effect on the  
7 verdict. See Brecht v Abrahamson, 507 US 619, 637 (1993). In other  
8 words, the error must have resulted in "actual prejudice." Id.

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11 The California Court of Appeal's rejection of petitioner's  
12 claim that the trial court violated his due process rights when it  
13 did not issue the unanimity instruction was not contrary to, nor did  
14 it involve an unreasonable application of, clearly established  
15 Supreme Court precedent, and neither was it based on an unreasonable  
16 determination of the facts. See 28 USC § 2254(d).

17 The California Court of Appeal determined that under  
18 California law, the instruction was not necessary because there was  
19 only one theory of the offense. See People v Diaz, 2005 WL 941402,  
20 at \*5. Insofar as petitioner's claim is that there was a violation  
21 of his due process rights because the California courts erred in  
22 interpreting state law, federal habeas relief is unavailable. A  
23 challenge to a jury instruction solely as an error under state law  
24 does not state a claim cognizable in federal habeas corpus  
25 proceedings. See Estelle, 502 US at 71-72.

26 Petitioner is not entitled to federal habeas relief based  
27 on federal law. The federal Constitution does not require that a  
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1 jury agree "on the preliminary factual issues which underlie the  
2 verdict." Schad v Arizona, 501 US 624, 631-32 (1991). The  
3 California Court of Appeal determined that although it was possible  
4 to disagree when petitioner took the wallet or applied force, there  
5 was only a single discrete crime that could have been committed,  
6 and, therefore, it was not necessary to give a unanimity  
7 instruction. The state court's determination was not an objectively  
8 unreasonable application of clearly established federal law. Accord  
9 United States v Fejes, 232 F3d 696, 702 (9th Cir 2000) (stating that  
10 a court need not instruct jury that single set of facts must be  
11 agreed upon). The state court did not commit error in failing to,  
12 sua sponte, issue the unanimity instruction.

## B

14  
15 Petitioner claims that he was denied due process because  
16 the trial court erred in giving the standard instruction for aiding  
17 and abetting a robbery, when the prosecution's theory was that  
18 petitioner was the direct perpetrator of the robbery. As given,  
19 CALJIC No 9.40.1 stated:

20 The commission of the crime of robbery is not  
21 confined to a fixed place or a limited period of  
22 time and continues as long as the stolen  
property is being carried away to a place of  
temporary safety.

23 People v Diaz, 2005 WL 941402, at \*6. Petitioner argues that the  
24 instruction allowed the jury to find that he was guilty of robbery  
25 on the basis of after-acquired intent to steal.

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2 The California Court of Appeal found that the trial court  
3 erred in giving the instruction, but concluded that the error was  
4 harmless. The court explained that:

5 [e]ven if CALJIC No 9.40.1 allowed the jury to  
6 convict defendant on the basis of after-  
7 acquired intent to commit robbery, we see  
8 nothing in the record to show that the jurors  
9 convicted defendant on that ground. The trial  
10 court gave jury instructions clarifying that  
11 the jury could not convict defendant of robbery  
12 on the basis of after-acquired intent to steal.  
13 CALJIC No 9.40, the standard robbery  
14 instruction, was given: "Every person who takes  
15 personal property in the possession of another  
16 against the will and from the person or  
17 immediate presence of that person accomplished  
18 by means of force or fear and with the specific  
19 intent permanently to deprive the person of the  
20 property is guilty of the crime of robbery, in  
21 violation of Penal Code section 211."

22 In addition, CALJIC No 9.40.2, as given,  
23 instructed the jury: "To constitute the crime  
24 of robbery, the perpetrator must have formed  
25 the specific intent to permanently deprive the  
26 owner of his property before or at the time of  
27 the taking-at the time of the taking of the  
28 property occurred. If the intent was not  
formed until after the property was taken from  
the person or immediate presence of the victim,  
the crime of robbery has not been committed."

People v Diaz, 2005 WL 941402, at \*7 (footnote omitted).

21 The court of appeal found that CALJIC No 9.40.1 did not  
22 render the jury instructions "misleading as a whole." Id. The  
23 jury was expressly instructed that it could not convict petitioner  
24 of robbery based on after-acquired intent. Id. It was also  
25 instructed with CALJIC No 17.31, which provides in relevant part:  
26 "Whether some instructions apply will depend on what you find to be  
27 the facts. Disregard any instruction which applies to facts  
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1 determined by you not to exist." *People v Diaz*, 2005 WL 941402, at  
2 \*7.

3 The court of appeal also found that there was ample  
4 evidence that petitioner took the victim's wallet by means of force  
5 and with the intent to permanently deprive him of it. *Id.*

6 The court of appeal concluded that reversal was not  
7 required because "nothing in the record \* \* \* show[s] that the sole  
8 basis of the verdict of guilt on the robbery count was the invalid  
9 ground of after-acquired intent to steal." *Id.*

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12 When evaluating whether there has been a constitutional  
13 violation based on instructional error, the challenged instruction  
14 must not be judged in artificial isolation, but must be considered  
15 in the context of the instructions as a whole and the trial record.  
16 Estelle, 502 US at 72. The federal court must review the  
17 instruction in the light of whether the jury was reasonably likely  
18 to interpret the instruction in an unconstitutional manner. *Id.*

19 If constitutional error is found, the court also must  
20 find that the error had a substantial and injurious effect or  
21 influence in determining the jury's verdict before granting relief  
22 in habeas proceedings. See Calderon v Coleman, 525 US 141, 146-47  
23 (1998) (citing Brecht, 507 US at 637).

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26 The California Court of Appeal's finding that the  
27 erroneous jury instruction was not reversible error was not  
28

1 contrary to, nor did it involved an unreasonable application of,  
2 clearly established Supreme Court precedent, and neither was it  
3 based on an unreasonable determination of the facts. See 28 USC §  
4 2254(d).

5 Even though the trial court erred under California law by  
6 giving CALJIC No 9.40.1, the error cannot be said to have so  
7 infected the trial that it violated petitioner's due process  
8 rights. The jury was properly instructed on the elements of  
9 robbery, expressly instructed that it could not convict petitioner  
10 based on after-acquired intent and cautioned to disregard any  
11 instructions that contradicted facts found by the jury. Taking  
12 into account all of the jury instructions, it cannot be said that  
13 the jury applied the instructions in an unconstitutional manner.  
14 See Estelle, 502 US at 72.

15  
16 C

17 Petitioner claims that he was denied due process because  
18 the trial court erred in admitting evidence of statements he made  
19 to police officers regarding uncharged criminal conduct. The  
20 statements consisted of petitioner's admission of participation in  
21 a "jacking jags" scheme, which meant "robbing field worker type  
22 Hispanics." People v Diaz, 2005 WL 941402, at \*8 (internal  
23 quotation marks omitted). This scheme involved defendant and a  
24 female accomplice; petitioner's role was to use a badge to take the  
25 victim's property. Id. The prosecution argued that the "jacking  
26 jags" statement was evidence of a common plan or design that  
27 petitioner had also employed in committing the robbery in this  
28

1 case. Id at \*9.

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3 1

4 The California Court of Appeal rejected petitioner's  
5 claim that the statements were unduly prejudicial to petitioner and  
6 found no abuse of discretion in the trial court's admission of the  
7 evidence. The court explained:

8 Under the standard established by our Supreme  
9 Court, there was sufficient similarity between  
10 the "'jacking jags'" scheme and the current  
11 robbery offense to admit the uncharged offense  
12 evidence on the issue of intent. "The least  
13 degree of similarity is required to establish  
14 relevance on the issue of intent. [Citation.]  
15 For this purpose, the uncharged crimes need  
16 only be sufficiently similar [to the charged  
17 offenses] to support the inference that the  
18 defendant probably harbor[ed] the same intent  
19 in each instance. [Citation.]" People v Kipp,  
20 supra, 18 Cal4th at 371 (quoting People v  
21 Ewoldt (1994) 7 Cal4th 380, 402). Thus, the  
22 uncharged crimes need not be identical to the  
23 charged offenses.

24 Here, there is a strong similarity between the  
25 uncharged criminal conduct and the charged  
26 offense. The uncharged criminal conduct  
27 involved a scheme whereby defendant would steal  
28 property from individuals by working with a  
female accomplice, who would solicit an act of  
prostitution from the victim. Defendant would  
then use a badge to obtain the victim's  
property without the use of force. The charged  
offense likewise involved a female accomplice,  
a solicitation for an act of prostitution, and  
a police officer ruse. According to Peralta's  
trial testimony, defendant worked with a blonde  
woman who solicited an act of prostitution from  
Peralta. Defendant then appeared with a badge,  
identified himself as a police officer, and  
demanded Peralta's identification, which led to  
Peralta taking out his wallet and defendant  
grabbing it. Thus, the charged and uncharged  
offenses are sufficiently similar to support  
the inference that, in each instance, defendant  
probably intended to steal the victim's

1 property.

2 Defendant's reliance on People v Thompson  
3 (1980) 27 Cal3d 303, for a different result is  
4 misplaced. In Thompson, the only similarity  
5 between the uncharged robbery of a restaurant  
6 employee in a restaurant parking lot and the  
7 charged home invasion burglary and robbery was  
8 the defendant's act of demanding and taking the  
9 victim's car keys. People v Thompson, supra,  
10 27 Cal3d at 321. The California Supreme Court  
11 ruled, "Evidence that an individual intended to  
12 steal car keys on one occasion does not, by  
13 itself, substantially tend to prove that he  
14 intended to steal them on a second occasion."  
15 Ibid. However, the facts of the present case  
16 are not analogous to facts in Thompson. The  
17 similarities between defendant's uncharged and  
18 charged criminal conduct are obviously much  
19 greater.

20 Finally, we are mindful of the "additional  
21 requirement for the admissibility of evidence  
22 of uncharged crimes: The probative value of the  
23 uncharged offense evidence must be substantial  
24 and must not be largely outweighed by the  
25 probability that its admission would create a  
26 serious danger of undue prejudice, of confusing  
27 the issues, or of misleading the jury." People  
28 v Kipp, supra, 18 Cal4th at 371. No such  
danger was present in this case. The probative  
value of the evidence of the "jacking jags"  
scheme on the issue of intent was substantial  
in light of the defense theory that defendant  
had assaulted Peralta under the belief that  
Peralta was propositioning defendant's  
daughter, with no intent to steal. Further, it  
was unlikely that the evidence of the uncharged  
offenses confused or misled the jury, given the  
simplicity of the "jacking jags" scheme and its  
similarity to the current offense. The  
probative value of the uncharged offense  
evidence consequently outweighed the danger of  
undue prejudice.

People v Diaz, 2005 WL 941402, at \*\*9-12.

The admission of evidence is not subject to federal  
habeas review unless a specific constitutional guarantee is

1 violated or the error is of such magnitude that the result is a  
2 denial of the fundamentally fair trial guaranteed by due process.  
3 See Henry v Kernan, 197 F3d 1021, 1031 (9th Cir 1991). Failure to  
4 comply with state rules of evidence is neither a necessary nor a  
5 sufficient basis for granting federal habeas relief on due process  
6 grounds. Id; Jammal v Van de Kamp, 926 F3d 918, 919 (9th Cir  
7 1991). The due process inquiry in federal habeas review is whether  
8 the admission of evidence was arbitrary or so prejudicial that it  
9 rendered the trial fundamentally unfair. See Walters v Maass, 45  
10 F3d 1355, 1357 (9th Cir 1995). Notably, however, only if there are  
11 no permissible inferences that the jury may draw from the evidence  
12 can its admission violate due process. See Jammal, 926 F2d at 920.

13 Even if evidence was admitted at trial erroneously,  
14 petitioner must still show that the error had a substantial and  
15 injurious effect or influence in determining the jury's verdict  
16 before habeas relief can be granted. Brecht, 507 US at 637.

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19 The California Court of Appeal's finding that  
20 petitioner's statements regarding uncharged criminal conduct was  
21 admissible evidence to show intent was not contrary to, nor did it  
22 involve an unreasonable application of, clearly established Supreme  
23 Court precedent, and neither was it based on an unreasonable  
24 determination of the facts. See 28 USC § 2254(d).

25 This court cannot disturb the state trial court's  
26 admission of the statements because there were permissible  
27 inferences the jury could have drawn from the evidence. See  
28

1 Jammal, 926 F3d at 920. The admission of other acts evidence does  
2 not violate due process where, as here, the jury could draw an  
3 inference of intent from the evidence. See Houston v Roe, 177 F3d  
4 901, 910 n6 (9th Cir 1999).

5 Petitioner contends that the evidence of the jacking jags  
6 scheme was too dissimilar to be admissible to show a common plan or  
7 scheme. Petitioner asserts that the jacking jags scheme involved  
8 the use of a badge so as to not use force to take property, whereas  
9 the current crime did involve force. But the fact that petitioner  
10 struck the victim in this case is not sufficient to distinguish the  
11 two schemes. The state court of appeal reasonably concluded that  
12 the prior uncharged criminal conduct evidence was highly probative  
13 in establishing petitioner's intent to rob the victim and showed a  
14 common plan. Its admission did not violate due process because the  
15 jury could draw permissible inferences from the evidence. See *id.*

16 Furthermore, there is no indication that the admission of  
17 petitioner's statements had a "substantial and injurious effect on  
18 the verdict." Brecht, 507 US at 623. There is nothing in the  
19 record that indicates that the jury used the evidence solely as  
20 proof of petitioner's bad character or that the jury drew only  
21 impermissible inferences. Moreover, ample other evidence supports  
22 the jury's verdict.

23 Petitioner is not entitled to federal habeas relief on  
24 his character evidence claim because the admission of the prior  
25 acts was not contrary to, or involved an unreasonable determination  
26 of, clearly established Supreme Court precedent, or involved an  
27 unreasonable determination of the facts. See 28 USC § 2254(d).  
28

D

Petitioner claims that there was insufficient evidence to support his conviction under California Penal Code section 538(d) for unlawful use of a badge, resulting in a denial of his due process rights. He argues that the conviction is not supported by sufficient evidence because the badge he used did not sufficiently resemble badges used by City of Salinas police officers.

1

The California Court of Appeal rejected petitioner's claim:

The parties have not cited and we have not found through independent research any California decisions that provide guidance in determining when an unauthorized badge sufficiently resembles an authorized police officer's badge for purposes of section 538d, subdivision (b)(2). However, to determine whether sufficient evidence supports the conviction of unlawful use of a badge, we follow a well established rule. We "review the whole record in the light most favorable to the judgment below to determine and decide whether it discloses substantial evidence ... such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." People v Johnson (1980) 26 Cal3d 557, 578. Under this standard, the court does not "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt. [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] People v Hatch (2000) 22 Cal4th 260, 272 (quoting Jackson v Virginia (1979) 443 US 307, 318-319).

Viewing the record in the light most favorable to the judgment, we find substantial evidence to support defendant's conviction of unlawful

1 use of a badge under section 538d, subdivision  
2 (b)(2). Defendant implicitly concedes two  
3 elements of the offense. First, it is  
4 undisputed that defendant was wearing a badge  
5 during the incident involving Peralta. Second,  
6 defendant does not challenge the sufficiency of  
7 the evidence showing that he willfully used a  
8 badge to impersonate a police officer.  
9 Defendant only challenges the element requiring  
10 the badge used in the offense to "so resembl[e]  
11 the authorized badge of a peace officer as  
12 would deceive any ordinary reasonable person  
13 into believing that it is authorized for the  
14 use of one who by law is given the authority of  
15 a peace officer." § 538d, subd (b)(2).

16 \* \* \*

17 We have examined defendant's badge and find the  
18 prosecutor's comparison of that badge with  
19 Officer Godwin's authorized badge, which the  
20 officer displayed during his testimony, to be  
21 accurate. The prosecutor stated, "You remember  
22 I had Officer Godwin show you his badge. It  
23 was a black leather oval backing with a silver  
24 star attached in front of it. You look at the  
25 defendant's security badge, it's a black  
26 leather oval backing with a silver star  
27 attached. Really, the only difference is the  
28 fact that the defendant wore his around his  
neck, and that the wording, if you were able to  
get close enough to read the wording, is  
clearly different." Trial counsel did not  
object to this description.

We do not agree with defendant that the  
difference in the wording and symbols on the  
two badges precluded the jury from finding that  
the badge used by defendant sufficiently  
"resembles the authorized badge of a peace  
officer as would deceive any ordinary  
reasonable person" into believing that the  
badge was an authorized police officer's badge.  
§ 538d, subd (b)(2). As the prosecutor pointed  
out, the two badges resemble each other in  
their most visible aspects, including the shape  
(oval), the color (black), and the largest  
symbol (a silver star). An ordinary reasonable  
person could be deceived by these obvious  
similarities, without making a detailed  
comparison of the much smaller, less visible  
words and symbols.

1 Accordingly, having viewed the evidence in the  
2 light most favorable to the prosecution, we  
3 determine that a rational trier of fact could  
4 have found the essential elements of the crime  
5 beyond a reasonable doubt. Therefore, we  
6 conclude that there is sufficient evidence to  
7 support the conviction for unlawful use of a  
8 badge.

9 People v Diaz, 2005 WL 941402, \*\*11-13 (footnote omitted).

10 2

11 A state prisoner who alleges that the evidence in support  
12 of his state conviction was insufficient to have led a rational  
13 trier of fact to find guilt beyond a reasonable doubt states a  
14 constitutional claim. Jackson v Virginia, 443 US 307, 321 (1979).  
15 But a federal court reviewing collaterally a state court conviction  
16 does not determine whether it is satisfied that the evidence  
17 established guilt beyond a reasonable doubt. Payne v Borg, 982 F2d  
18 335, 338 (9th Cir 1992). The federal court "determines only  
19 whether, 'after viewing the evidence in the light most favorable to  
20 the prosecution, any rational trier of fact could have found the  
21 essential elements of the crime beyond a reasonable doubt.'" Id  
22 (quoting Jackson, 443 US at 319).

23 3

24 The California Court of Appeal's determination that there  
25 was sufficient evidence to support the conviction for unlawful use  
26 of a badge was not contrary to, nor did it involve an unreasonable  
27 application of, clearly established Supreme Court precedent, and  
28 neither was it based on an unreasonable determination of the facts.

See 28 USC § 2254 (d) .

Petitioner's argument that the badges were too dissimilar to justify his conviction is without merit. The California Court of Appeal found that the two most visible aspects of the badges, the leather oval backing and attached silver star, were the same. The court's determination that the similarities were sufficient to support the conviction should not be disturbed. The question here is only whether, on the evidence proffered at trial, a reasonable trier of fact could have found proof of guilt beyond a reasonable doubt. See Jackson, 443 US at 324. As the court of appeal found, the similarities between the badges were marked, the differences could only have been seen from a close distance, and petitioner identified himself as a police officer to the victim. It simply cannot be said that the state court unreasonably applied the Jackson standard in rejecting petitioner's insufficient evidence claim. See Juan H v Allen, 408 F3d 1262, 1275 (9th Cir 2005). Because a reasonable trier of fact could find proof of guilt beyond a reasonable doubt, petitioner's claim fails.

## E

Petitioner also seeks federal habeas relief on the ground that he was denied his Sixth Amendment right to effective assistance of counsel because of his trial counsel's failure to file a suppression motion. Petitioner argues that the viewing of the stun gun on his bed by Officer Godwin was unconstitutional under the Fourth Amendment and that his counsel's failure to file a motion to suppress statements regarding the stun gun amounted to

1 ineffective assistance of counsel.

2           Petitioner raised the claim in a petition for a writ of  
3 habeas corpus in the California Court of Appeal. The petition was  
4 summarily denied.

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7           In order to prevail on a Sixth Amendment ineffective  
8 assistance of counsel claim, petitioner must establish two things.  
9 First, petitioner must show that counsel's performance was  
10 deficient, ie, that it fell below an objective standard of  
11 reasonableness under prevailing professional norms. Strickland v  
12 Washington, 466 US 668, 687-88 (1984). Second, petitioner must  
13 establish that he was prejudiced by counsel's deficient  
14 performance, ie, that "there is a reasonable probability that, but  
15 for counsel's unprofessional errors, the result of the proceeding  
16 would have been different." Id at 694.

17           A claim that defense counsel failed to litigate a Fourth  
18 Amendment claim is not barred by Stone v Powell, 428 US 465, 481-82  
19 (1976), which ordinarily bars federal habeas relief of Fourth  
20 Amendment claims unless the state did not provide an opportunity  
21 for full and fair litigation of those claims. See Kimmelman v  
22 Morrison, 477 US 365, 373-83 (1986). Petitioner must show,  
23 however, that: (1) the overlooked suppression motion would have  
24 been meritorious, and (2) there is a reasonable probability that  
25 the jury would have reached a different verdict absent the  
26 introduction of the unlawful evidence. Ortiz-Sandoval v Clarke,  
27 323 F3d 1165, 1170 (9th Cir 2003).

The California Court of Appeal's rejection of petitioner's state habeas petition seeking relief on the ground of ineffective assistance of counsel was not contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent, and neither was it based on an unreasonable determination of the facts. See 28 USC § 2254(d).

If a court can reject a claim of ineffective assistance of counsel on the basis of lack of prejudice, it should do so. Strickland, 466 US at 697. Here, petitioner fails to carry his burden of showing prejudice because he has not established that the suppression motion would have been successful. See Ortiz-Sandoval, 323 F3d at 1170. While petitioner does cite to cases in which California and other state courts have found unreasonable searches when officers peered through windows, none of the cases cited support a finding that the search at issue here was unreasonable. Petitioner relies upon People v Camacho, 23 Cal 4th 824 (2000), to support his contention that he had a reasonable expectation of privacy in his room. But Camacho dealt with officers peering through a window in the back of defendant's privately owned home, an area from which he had a right to exclude the public. In contrast, petitioner's room here was on the first floor of a motel, the window was open, and the window faced a public motel path. The authority cited by petitioner fails to establish that a motion to suppress would have been meritorious.

Even if petitioner showed that the suppression motion would have been meritorious, his ineffective assistance of counsel

claim would still fail because he cannot show that there is a reasonable probability that the jury would have reached a different verdict without Godwin's testimony about the stun gun. See Ortiz-Sandoval, 323 F3d at 1170. The stun gun was not a critical piece of evidence relied upon by the prosecution. While the stun gun did corroborate that petitioner was the person the victim encountered, petitioner's identity as the perpetrator was never really in question. The defense's theory was not mistaken identity, but that petitioner did not have the intent to rob the victim. There is nothing in the record to support petitioner's assertion that the jury would have reached a different verdict if the observation of the stun gun had been suppressed.

**F**

The California Court of Appeal summarized the relevant facts as follows:

The trial court struck two of the three prior strike convictions for robbery in the interest of justice under section 1385. The trial court then sentenced defendant to a total term of 15 years on count one (robbery; § 211). The sentence included the upper term of five years, doubled pursuant to [the Three Strikes Law], plus a five-year enhancement pursuant to section 667, subdivision (a).

In deciding to impose the upper term, the trial court made several findings: "The Court finds the following factors in aggravation apply, great violence, viciousness and callousness. The manner in which the crime was committed indicates plenty of sophistication and professionalism. The defendant has engaged in a violent pattern which indicates a danger to society. The defendant's prior convictions are numerous, the defendant's prior probation or parole, the Court finds no factors in mitigation."

People v Diaz, 2005 WL 941402, at \*14 (footnotes omitted).

The court of appeal then summarized petitioner's Blakely error claim and rejected it:

We first consider the People's argument that imposition of the upper term of five years did not violate the principles of Blakely because five years is less than the statutory maximum for defendant's offense. The People explain that the statutory maximum is a Three Strikes sentence of 26 years to life, pursuant to sections 667.17 and 1170.12, subdivision (c), because the trial court found true the allegations that defendant had three prior strike convictions. We agree that the sentence imposed is less than the statutory maximum.

A trial court's decision to strike prior strike convictions does not change the facts on which a maximum statutory sentence of 25 years to life is authorized under the Three Strikes law. As our Supreme Court explained in People v

1        Garcia (1999) 20 Cal4th 490, "[I]n a Three  
2        Strikes case, as in other cases, when a court  
3        has struck a prior conviction allegation, it  
4        has not 'wipe[d] out' that conviction as though  
5        the defendant had never suffered it; rather,  
6        the conviction remains a part of the  
7        defendant's personal history, and a court may  
8        consider it when sentencing the defendant for  
9        other convictions, including others in the same  
10       proceeding." Id at 499; see also People v  
11       Wallace (2004) 33 Cal4th 738, 748.

12       In the present case, defendant waived his right  
13       to a jury trial on the allegations that he had  
14       three prior strike convictions of robbery. The  
15       trial court found the allegations true.  
16       Accordingly, the statutory maximum sentence for  
17       which defendant is eligible is 25 years to life  
18       under the Three Strikes law. § 1170.12, subd  
19       (c)(2). The trial court's decision to strike  
20       two of the three prior strike convictions did  
21       not change the facts on which a maximum  
22       statutory sentence of 25 years to life is  
23       authorized. Because the upper term imposed by  
24       the trial court is five years, less than the  
25       statutory maximum, the sentence did not violate  
26       the principles of Blakely.

27       People v Diaz, 2005 WL 941402, at \*15 (footnotes omitted).

28       2

      The Sixth Amendment to the United States Constitution  
guarantees a criminal defendant the right to a trial by jury. US  
Const amend VI. This right to a jury trial has been made  
applicable to state criminal proceedings via the Fourteenth  
Amendment. Duncan v Louisiana, 391 US 145, 149-50 (1968).

      The Supreme Court's Sixth Amendment jurisprudence was  
significantly expanded by Apprendi v New Jersey, 530 US 466 (2000),  
and its progeny, which extended a defendant's right to trial by  
jury to the fact finding used to make enhanced sentencing

1 determinations. "Other than the fact of a prior conviction, any  
2 fact that increases the penalty for a crime beyond the prescribed  
3 statutory maximum must be submitted to a jury, and proved beyond a  
4 reasonable doubt." 530 US at 490. The "statutory maximum" for  
5 Apprendi purposes is the maximum sentence a judge could impose  
6 based solely on the facts reflected in the jury verdict or admitted  
7 by the defendant; that is, the relevant "statutory maximum" is not  
8 the sentence the judge could impose after finding additional facts,  
9 but rather is the maximum he or she could impose without any  
10 additional findings. Blakely v Washington, 542 US 296, 303-04  
11 (2004). The Court reaffirmed this basic principle when it  
12 determined that the federal sentencing guidelines violated the  
13 Sixth Amendment because they imposed mandatory sentencing ranges  
14 based on factual findings made by the sentencing court. See United  
15 States v Booker, 543 US 220, 233-38 (2005). The sentencing  
16 guidelines were unconstitutional because they required the court to  
17 impose an enhanced sentence based on factual determinations not  
18 made by the jury beyond a reasonable doubt. Id at 243-45.

19 In Cunningham v California, 127 S Ct 856 (2007), the  
20 Court held that California's determinate sentencing law (DSL)  
21 violated the Sixth Amendment because it allowed the sentencing  
22 court to impose an elevated sentence based on aggravating facts  
23 that it found to exist by a preponderance of the evidence. 127 S  
24 Ct at 856, 870-71. The sentencing court was directed under the DSL  
25 to start with a "middle term" and then move to an "upper term" only  
26 if it found aggravating factual circumstances beyond the elements  
27 of the charged offense. Id at 862. Concluding that the middle  
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1 term was the relevant statutory maximum, and noting that  
2 aggravating facts were found by a judge and not the jury, the Court  
3 held that the California sentencing law violated the rule set out  
4 in Apprendi. Id at 871. Although the DSL gave judges broad  
5 discretion to identify aggravating factors, this discretion did not  
6 make the upper term the statutory maximum because the jury verdict  
7 alone did not authorize the sentence and judges did not have the  
8 discretion to choose the upper term unless it was justified by  
9 additional facts. Id at 868-69.

10 Failure to submit a sentencing factor to the jury, like  
11 failure to submit an element to the jury, is not structural error;  
12 it is subject to harmless-error analysis. Washington v Recuenco,  
13 548 US 212, 221-22 (2006).

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16 The California Court of Appeal's rejection of  
17 petitioner's Blakely claim was not contrary to, nor did it involve  
18 an unreasonable application of, clearly established Supreme Court  
19 precedent, and neither was it based on an unreasonable  
20 determination of the facts. See 28 USC § 2254(d).

21 Petitioner's sentence did not violate Blakely because the  
22 sentence was not more than the statutory maximum the judge could  
23 impose without any additional findings. See Blakely, 542 US at  
24 303-04. Because petitioner waived his right to a jury trial on the  
25 allegations that he had suffered three prior strike convictions and  
26 the court found the allegations to be true, it was permissible for  
27 the trial judge to take note of the prior strike convictions when  
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1 deciding to impose the upper term sentence. Two of the prior  
2 strike convictions provided sufficient justification for imposing  
3 the upper term sentence of five years without requiring the judge  
4 to make any additional findings. See *id.* And the third prior  
5 strike conviction provided the basis to double the base sentence  
6 pursuant to the Three Strikes Law. The fact that the trial judge  
7 struck two of the prior strike convictions for purposes of the  
8 Three Strikes Law does not alter the fact that those priors could  
9 be used as the basis for imposing the upper term without any  
10 additional findings. Petitioners sentence did not violate Blakely.

11 Even if there had been a Blakely violation, petitioner  
12 would not be entitled to federal habeas relief because it could not  
13 be said that petitioner was prejudiced by the trial court's  
14 sentence. See Washington, 548 US at 221-22. After petitioner  
15 waived a jury trial on allegations that he suffered several prior  
16 convictions, the trial judge found that petitioner had suffered  
17 three prior strike convictions. This fact alone justified a  
18 minimum sentence of 25 years to life. But the trial judge struck  
19 two of the priors for purposes of the Three Strikes Law and  
20 sentenced petitioner to 15 years. Because the sentence petitioner  
21 received was much shorter than the sentence he could have received  
22 based on the facts found by the jury and the facts of the prior  
23 strike convictions properly found by the trial judge, it cannot be  
24 said that petitioner was prejudiced by a Blakely error.

25 Petitioner is not entitled to federal habeas relief based  
26 on his Blakely claim because the state court's rejection of the  
27 claims was not contrary to, or involved an unreasonable  
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1 determination of, clearly established Supreme Court precedent, or  
2 involved an unreasonable determination of the facts. See 28 USC §  
3 2254 (d) .

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5 IV

6 For the foregoing reasons, the petition for a writ of  
7 habeas corpus is DENIED.

8 The clerk shall enter judgment in favor of respondent and  
9 close the file.

10 SO ORDERED.

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12 VAUGHN R WALKER  
13 United States District Chief Judge  
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